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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JEFFREY L.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D041182

(San Diego County
Super. Ct. No. SJ10819A)

PROCEEDINGS seeking extraordinary relief after reference to a Welfare and
Institutions Code section 366.26 hearing. William E. Lehnhardt, Judge. Petition denied.

Jeffrey L., father of dependent child Aaron L., seeks review of the juvenile court order terminating his reunification services and setting a Welfare and Institutions Code section 366.26 hearing (all statutory references are to the Welfare and Institutions Code). He contends the juvenile court prejudicially erred by not granting a continuance and by finding there was a substantial risk of detriment if Aaron was returned to his custody. We deny the petition.

BACKGROUND

In July 2000 Aaron's mother informed the San Diego County Health and Human Services Agency (the Agency) that Jeffrey hit and yelled at Aaron and was being verbally and emotionally abusive to her. The parents voluntarily agreed to participate in services. Jeffrey's voluntary case plan required him to participate in domestic violence, parenting and anger management classes. He was to be under psychiatric supervision, take psychotropic medication and undergo drug testing. His psychiatric diagnoses were bipolar and borderline personality disorders. Jeffrey completed a family skills development course but otherwise did not comply with his plan. The mother also failed to comply with her plan.

On March 29, 2001, the Agency took Aaron into protective custody and filed a dependency petition under section 300, subdivision (b) alleging the parents were unable to supervise or protect Aaron based on: 1) Aaron's exposure to threats and violent physical confrontations between his parents. 2) The mother testing positive for amphetamines and the father failing to drug test. 3) Both parents having been diagnosed as bipolar.

The parents underwent two psychological evaluations. The first evaluation concluded Jeffrey had little capacity for empathy and was an egocentric individual who tended to be preoccupied with gratifying his own needs. Jeffrey's dysfunctional and volatile relationship with the mother was considered to be highly resistant to change. The evaluator concluded Aaron's safety and well-being would be at grave risk should he be returned to the custody of the parents. The second evaluation diagnosed Jeffrey with Polysubstance Dependence, Bipolar Disorder, and Adjustment Disorder. Jeffrey's bipolar disorder and polysubstance abuse appeared to be chronic and continually threatening to Aaron's safety. The evaluator opined Jeffrey was currently unable to protect Aaron and his history of noncompliance with treatment of his chronic dual diagnoses made it unlikely he would be able to in the future.

The parents submitted to the petition's allegations. The court ordered Jeffrey to participate in individual therapy and domestic violence and parenting classes. He was to address his mental diagnoses by taking psychotropic medication as prescribed and to address his health conditions (which include diabetes and HIV) by seeing his physician as recommended and taking his medications as prescribed. He was additionally required to participate in S.A.R.M.S. and drug test.

The mother's services were terminated at the six-month review hearing. Jeffrey continued to participate in various services and visit with Aaron. In January 2002 he surrendered on a bench warrant and admitted to one count of contempt for a positive drug test. The court ordered him to drug court and to Bayview Hospital for admission into its short-term program for chemical dependency and to regulate his medications.

The 18-month review report signed September 19, 2002, recommended services be terminated and the case be set for a section 366.26 hearing. It was reported that Jeffrey was attending domestic violence classes, testing for S.A.R.M.S., attending Kenisis (a dual diagnoses program) and seeing his therapist. Jeffrey was attending Parent-Child Interactive Therapy with Aaron one day a week and had two hours unsupervised visits on another day. However, Jeffrey had suffered a relapse in July 2002, testing positive for cocaine. On two occasions in July and August of 2002 he had checked himself into Bayview Hospital, first for anxiety and later for depression. As a result of the drug relapse, Kenisis switched Jeffrey to aftercare for three days and required him to attend Kenisis five days a week. Jeffrey was taking seven different types of medication including insulin for his illnesses. The paternal grandfather was supplementing Jeffrey's SSI income in order to meet his expenses.

The Agency concluded Jeffrey was putting forth great effort to reunify with his son but that returning Aaron to his care would be detrimental to the child. Aaron was in a stable environment where he had structure and his medical needs were being met. The social worker opined Jeffrey was barely able to care for himself using all his resources to maintain himself in a somewhat stable condition. She further opined he was unable to perform the daily tasks necessary to provide care, structure, discipline, nurturance and stimulation for a four-year-old boy or to respond to inevitable emergencies. By addendum report, the Agency reported Jeffrey had missed numerous service appointments and visits during October. Jeffrey was repeatedly absent from S.A.R.M.S. Jeffrey reported he was so ill he had been unable to answer the telephone for eight days.

The social worker opined the pattern was consistent with reports she had received from Jeffrey's family members that he was able to maintain stability for a few months but was unable to parent on a long-term basis.

Jeffrey did not appear at the November 12, 2002 contested hearing. His counsel reported Jeffrey had left a voice mail indicating he was ill and was unable to attend that day. Counsel pointed out Jeffrey had numerous health problems and had been ill frequently throughout October. Counsel indicated Jeffrey was a crucial part of their case and requested a continuance so that he might be there. The court denied the motion finding Jeffrey had not established good cause for the continuance. The court noted Jeffrey was claiming he was ill but had not provided medical evidence to support his claim.

The hearing proceeded with cross-examination of the social worker. Stipulated testimony was received that if Aaron was returned to Jeffrey, the foster mother of Aaron's sibling would provide emergency care for Aaron without compensation for up to one month at a time. At the end of the hearing, Jeffrey's counsel renewed the motion to continue to allow Jeffrey to testify. The court again denied the motion. The court set a section 366.26 hearing after finding by clear and convincing evidence that Aaron's return to Jeffrey's custody would create a substantial risk of detriment to Aaron's physical and emotional well-being.

Jeffrey seeks review by filing a petition for extraordinary relief. (§ 366.26, subd. (l); Cal. Rules of Court, rule 39.1B.) This court issued an order to show cause, the Agency responded and the parties waived oral argument.

DISCUSSION

Continuance Ruling

Jeffrey implies that the request for continuance may have been denied because the social worker and the court decided early in the case that his HIV status rendered him incapable of caring for Aaron. We find no support for Jeffrey's allegation that the court and social worker prejudged this case based on his physical health. To the contrary, we find the record to demonstrate quite the opposite. Jeffrey had a long-term history of mental illness and dependence on illegal drugs that severely impacted his ability to care for Aaron. Even in the face of two psychological evaluations that essentially found Jeffrey incapable of caring for Aaron at the time they were rendered or at anytime in the future, 18 months of extensive services were provided addressing his chronic dual diagnoses as well as his physical problems.

Jeffrey contends denial of his continuance request was prejudicial error which prevented him from testifying and demonstrating his stability and severely impacted his ability to argue for Aaron's return. In denying the continuance request, the court referred to a lack of medical evidence to support Jeffrey's claim he was too ill to attend court. Jeffrey argues the court had only to look at the record which was filled with references to his ongoing struggle with diabetes and his HIV status. Jeffrey further argues the issue at the hearing was Aaron's return to his custody and that without having heard his testimony on his emergency childcare plans, the court could not properly assess the risk of returning Aaron.

Continuances shall be granted only on a showing of good cause and are not granted if contrary to the child's interest. (§ 352, subd. (a).) In considering the child's interests, the court must give substantial weight to the child's need for a stable environment and a prompt resolution of his custody status and to the damage that might be caused by prolonged temporary placements. (*Ibid.*) An order denying a continuance is reversed on a showing of abuse of discretion only. (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810-811.)

The case was before the court for the 18-month hearing. At the time of the hearing it had been more than 19 months since Aaron was taken into protective custody and the petition had been filed. Aaron was two years old at the time proceedings were initiated and almost five years old at the time of the hearing. He was in need of a permanent placement. Although Jeffrey had regularly been attending court hearings, he had not attended the pre-trial hearing for the 18-month review hearing. Jeffrey and his counsel provided the court with no information on when he might be able to testify.

Favorable information on Jeffrey's progress in services was provided through service providers' written and oral reports submitted to the social worker and included with the reports submitted to the court. The court had before it the most recent reports and orders from drug court and S.A.R.M.S. The social worker was cross-examined on Jeffrey's case plan performance. Stipulated testimony of the foster mother who would provide emergency care for Aaron in the event Jeffrey was hospitalized was introduced. Although Jeffrey's testimony would have been beneficial in making a decision, we cannot

say based on all the circumstances that the court abused its discretion by denying the request for continuance.

Risk of Detriment Finding

At the 18-month review hearing, the court shall order the return of the child to the physical custody of the parent unless the court finds, by a preponderance of the evidence, that the return of the child would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. In making its determination, the court reviews and considers the social worker's reports and recommendations, the efforts or progress demonstrated by the parent and the extent to which the parent availed himself of services provided. (§ 366.22, subd. (a).)

To determine whether there is substantial evidence to support the trial court's findings, we review the evidence in a light most favorable to the prevailing party and indulge in all legitimate and reasonable inferences to uphold the court's ruling. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) The parent bears the burden of showing there is insufficient evidence to support the ruling. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

From the onset of proceedings, the protective issues in the case have been domestic violence, drug abuse and the parents' mental illnesses. Jeffrey had made considerable progress in pursuing his case plan. The focus of the court's evaluation, however, is whether he has made sufficient progress to resume custody, not whether he is participating and making progress with his plan. During the review period, Jeffrey had been required to hospitalize himself twice to address mental health issues. He was jailed

in August for testing positive for cocaine. In October Jeffrey had been too ill to regularly participate in services or regularly visit. Five days before the hearing a bench warrant issued from the drug court. Jeffrey's family members reported that his inability to maintain stability over the long term was a recurring pattern. The overwhelming evidence was that Jeffrey was having substantial difficulties in maintaining himself in a stable manner. He was in no position to provide a stable, safe home for a five-year-old child. Substantial evidence supports the court's finding that return of Aaron to his father's custody would create a substantial risk of detriment to Aaron's physical and emotional well-being.

DISPOSITION

The petition is denied.

McINTYRE, J.

WE CONCUR:

KREMER, P. J.

HALLER, J.